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NO. 88-568

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RICHARD L. DUGGER,
Secretary, Florida Department
of Offender Rehabilitation and
TOM BARTON, Superintendent
Florida State Prison at Starke, Florida,

Petitioners,

vs.

MACK RUFFIN, JR.,

Respondent.

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals should be required under Hitchcock v. Dugger, 481 U.S. 393 (1987) to discuss explicitly whether an error in restricting a jury from considering nonstatutory mitigating factors at a capital sentencing hearing might be harmless where the petitioner never argued that the error was harmless and the record contains patent indicia of harmful error?

2. Whether this Court should grant certiorari when other reasons, including a recent Supreme Court decision, Johnson v. Mississippi, ___ U.S. ___, 108 S.Ct. 1981 (1988), independently warrant the relief granted by the Eleventh Circuit?

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No. 88-568

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RICHARD L. DUGGER,
Secretary, Florida Department
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Florida State Prison at Starke, Florida,

Petitioners,

vs.

MACK RUFFIN, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PRELIMINARY STATEMENT

The State ("petitioners") here attacks a now typical decision of the Eleventh Circuit, Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988), granting Mr. Ruffin ("respondent") a new sentencing hearing based on the authority of Hitchcock v. Dugger, 481 U.S. 393 (1987). The State objects to the Eleventh Circuit's failure to discuss expressly whether the Hitchcock error could have been harmless error, even though the State had never previously argued that the error was harmless and even though there was patent harmful error. Indeed, even now the State does not argue that as

a matter of the factual record the error was harmless. Contrary to the State's assertions, the Eleventh Circuit's decision to vacate the death sentence subject to a new sentencing hearing was the appropriate remedy and the decision presents no conflicts with other Eleventh Circuit cases or Florida Supreme Court decisions.

In any event, the Eleventh Circuit's order of a new sentencing hearing is independently justified by other bases for that relief. Accordingly, this is not an appropriate case for an issuance of this Court's writ.

## STATEMENT OF THE CASE

Ruffin was convicted of premeditated murder and sentenced to death for the killing of Karol Hurst, which was actually committed by Freddie Lee Hall. The evidence in the case as to Ruffin's role in the Hurst killing is set forth in Ruffin's petition for a writ of certiorari (which is being filed simultaneously herewith, and to which this Court is respectfully referred). That evidence consists of Ruffin's statement to the police, in which he explained that he did not have a gun at the time, that he sought to convince Hall not to kill Hurst, and that he did not foresee Hall's lethal attack on Hurst, which followed Hall's cry that "he [Hall] done been up one time . . . he [Hall] wasn't going back, for nobody."[1] (TR 1239).

### A. Nonstatutory Mitigating Evidence Presented During The State Court Sentencing Proceeding

Ruffin presented a psychiatric report in mitigation (TR 1377-1382[2]). The report, made by a state-appointed psychiatrist

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1 Ruffin had no prior criminal record. Hall had previously served a prior sentence for rape.

2 References to the trial transcript are designated "TR __"; (footnote continued)

to consider Ruffin's competency to stand trial, contained information concerning nonstatutory mitigating factors such as Ruffin's deprived childhood, low intelligence and poor judgment. The defense also argued that Ruffin had no prior history of criminal activity, that Ruffin was young and his participation in the crime was relatively minor, and that Hall's size, age and prior criminal experience in contrast with respondent's slighter build, youth and low intelligence showed domination by Hall. (TR 1395-1398).

B. The Lockett/Hitchcock Violation

In his closing argument, the prosecutor specifically told the jury that Ruffin's low intelligence, mentioned in the report, was not a mitigating circumstance to be considered. (TR 1391-1392).

During the capital sentencing phase of respondent's trial Judge Booth instructed the jury as follows:

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these . . .

(TR 1407-1409). The court then listed the seven statutory mitigating circumstances set forth in Section 921.141 of the Florida Statutes (1985).

After the penalty phase, the jury recommended the death penalty, without specifying the mitigating and aggravating circumstances. The judge imposed the death penalty for the murder.[3] He

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references to other portions of the record before the Eleventh Circuit are designated "R __" and specified by volume and document or page number in accordance with the conventions of that court.

3 Ruffin was also convicted of sexual battery and sentenced to 30 years imprisonment.

found one mitigating circumstance, "[t]he age of the defendant at the time of the crime," and stated that respondent had failed to show any other mitigating circumstances.[4] (TR 1417-1418). The judge found three aggravating circumstances:

> That at the time of the crime for which he is to be sentenced, this defendant had been previously convicted of another capital offense or a felony involving the threat of violence to some person;
>
> That the crime . . . was committed while the defendant was engaged in the commission of, or the attempt to commit, or in flight after committing or attempting to commit any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;
>
> That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

(TR 1417-1419).[5]

The judgments and sentences were filed on July 21, 1978. Ruffin made a motion for a new trial which was denied on August 3, 1978.

C. Post-Conviction Proceedings

On direct appeal, on collateral review in the Florida courts, before the federal district court and before the Eleventh Circuit, Ruffin raised the argument that the jury's consideration of nonstatutory mitigating evidence was unconstitutionally limited. See Ruffin v. State, 397 So. 2d 277, 283 (Fla. 1981); Ruffin v. Wainwright, No. 82-196-Civ-Oc-16 (M.D. Fla. May 21, 1986) (order

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4 The judge did not consider the nonstatutory mitigating factors, as is clear from his finding that only one mitigating circumstance -- defendant's age -- had been shown. Respondent's trial judge was the judge in Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985), cert. denied, U.S. , 107 S. Ct. 1982 (1987), who stated that he believed that Florida law limited mitigating circumstances to those set forth in the Florida statute.

5 As noted infra, each of these findings was improper.

denying writ of habeas corpus); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir.) (per curiam). The State did not argue harmless error in these proceedings; rather it argued that no Lockett error occurred because (1) the jury was not affirmatively told that the list of statutory mitigating factors was exhaustive and (2) Ruffin was allowed to introduce evidence of nonstatutory mitigating factors during the sentencing phase of his trial. See Brief of Appellee in the United States Court of Appeals for the Eleventh Circuit at 29-30.

The district court erroneously accepted the State's claim that no Lockett error occurred, and stated that Ruffin "was allowed to introduce evidence of nonstatutory mitigating circumstances during the sentencing phase of his trial, and nothing in the record supports the contention that this evidence was not considered by the advisory jury." Ruffin v. Wainwright, No. 82-196-Civ-Oc-16 at 15, see State's Petition for Writ of Certiorari at A-3 (hereinafter "Petition").

Ruffin then appealed to the Eleventh Circuit Court of Appeals. Again Ruffin argued that the trial court had impermissibly limited the consideration of nonstatutory mitigating circumstances in the sentencing phase of the trial in violation of Lockett. The Eleventh Circuit heard oral arguments on January 31, 1987.

The Supreme Court decided Hitchcock v. Dugger on April 25, 1987. Thereafter, on April 30, 1987, Ruffin filed a motion for leave to file a brief concerning recent Supreme Court decisions, including Hitchcock. The leave was denied by order of Judge Hatchett on May 4, 1987. On August 11, 1987, Ruffin filed another motion, this time seeking leave to file a brief concerning two

recent Eleventh Circuit decisions, relating to, inter alia, Hitchcock. The State filed an opposition to this motion on August 17, 1987. The Eleventh Circuit has never issued an order concerning this motion. During the period from July 20, 1987 through June 13, 1988, both Ruffin and the State supplied the Eleventh Circuit with notices of supplemental authority relating to the Lockett/Hitchcock issue.

Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) (per curiam) was decided on June 20, 1988. The Eleventh Circuit reversed the decision of the district court and held that respondent's sentence was unconstitutional in light of Lockett v. Ohio, 438 U.S. 586 (1978) (plurality) and Hitchcock v. Dugger, 481 U.S. 393 (1987), because the jury had been restricted in its consideration of mitigating circumstances to those enumerated in the Florida statute. In light of this error, the Court of Appeals remanded Ruffin's "Lockett claim to the district court with instructions to enter an order granting the application for a writ of habeas corpus, unless the State within a reasonable period of time either resentences [Ruffin] in a proceeding that comports with the requirements of Lockett or vacates the death sentence and imposes a lesser sentence consistent with law." 848 F.2d at 1519.

Having lost on the Lockett/Hitchcock issue in the Eleventh Circuit, the State filed a suggestion of rehearing en banc, on July 8, 1988. Even in that suggestion, the State does not contend that there were not substantial non-statutory mitigating circumstances in the record; the State merely reiterates in a confused fashion its previous points. The State's suggestion was denied by the Eleventh Circuit on August 18, 1988.

## REASONS FOR DENYING THE WRIT

THE ALTERNATIVE HOLDING BELOW GRANTING HABEAS RELIEF UNDER *Witherspoon* WAS UNANIMOUS AND IS NOT WORTHY OF REVIEW BY THIS COURT.

### A. This Court Should Not Consider The Harmless Error Issue Because The State Failed To Timely Raise The Issue In The Court Below

The State claims that the Court of Appeals for the Eleventh Circuit failed to apply a harmless error analysis before granting relief under *Witherspoon*. In effect, the State is criticizing the Eleventh Circuit panel for deciding to engage in unnecessary analysis concerning harmless error, when the State never argued the issue and the *Witherspoon* error was clearly prejudicial. Such a complaint by a properly supported harmless error argument does not present an important legal issue worthy of consideration by this Court.

The failure to raise the harmless error issue in the court below is fatal. As this Court has often stated, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *United States v. Irvin*, 327 U.S. 203, 220 (1946); *Connecticut v. United Mine Workers*, 316 U.S. 369, 370 (1942). This rule has been applied in the harmless error context as well. *See Rushen v. Spain*, 464 U.S. 114 (1983). In *Rushen v. Spain*, this Court declined to engage in a *Chapman v. California*, 386 U.S. 18 (1967) harmless error analysis concerning the improper admission into evidence of a defendant's post-arrest statements taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The reason for this Court's refusal

was the State's failure to raise the issue in the court below. Berkemer v. McCarty, 468 U.S. at 443.

Despite the opportunity, the State concededly failed to argue in its lead brief or upon oral argument before the Eleventh Circuit that the instructions presented to the jury at respondent's sentencing hearing, if erroneous, were harmless. Petition at 19. Moreover, the Eleventh Circuit never barred the State from further briefing on the Hitchcock issue, despite the State's assertions to the contrary. Petition at 13. Judge Hatchett's May 4, 1987 order only denied Ruffin's request for supplemental briefing. Petition at A-4. The State never moved for supplemental briefing on the Hitchcock issue and apparently had no desire to brief the issue; indeed in its motion in opposition to Ruffin's motion for leave to file a supplemental brief it stated:

> [Ruffin] has submitted a most competent and inclusive nine page motion which functions as the equivalent of a supplemental brief. The Hitchcock claim is one that this court has not ignored; and at this juncture there is little that supplemental briefing on this case would accomplish in light of the internal Eleventh Circuit decisions now being filed. (App. at 2a.)[6]

The State's Motion in Opposition to Ruffin's Motion for Leave to File Supplemental Brief, at 2.

The State raised the harmless error issue for the first time in a suggestion for a rehearing en banc. This is not sufficient to constitute a timely raising of the issue for this Court's review. See Hoover v. Ronwin, 466 U.S. 558, 574 n.25 (1984) (argument raised for the first time in response to motion for rehearing in the court of appeals precludes Supreme Court consideration). In any event, the Eleventh Circuit denied the

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6 App. refers to the Appendix attached hereto.

State's suggestion for a rehearing en banc on the harmless error issue.[7] (App. at 3a).

B. No Conflict Exists Between The Ruffin Decision, Other Eleventh Circuit Opinions And Florida Supreme Court Decisions Concerning The Application Of Harmless Error To Lockett/Hitchcock Claims

The State claims that the Ruffin decision conflicts with Eleventh Circuit precedent and Florida Supreme Court rulings. There is no indication, however, that the Ruffin court misapplied in any respect the harmless error doctrine. The Eleventh Circuit is well aware of its responsibility to apply the Chapman harmless error standard to Hitchcock errors and has applied it where appropriate. Compare Clark v. Dugger, 834 F.2d 1561, 1569-70 (11th Cir. 1987) (instructional error harmless where defendant "failed to produce evidence of any nonstatutory mitigating factors") cert. denied, ____ U.S. ____, 108 S. Ct. 1282 (1988) with Magill v. Dugger, 824 F.2d 879, 893-894 (11th Cir. 1987) (instructional error not harmless where nonstatutory mitigating factors introduced along with compelling statutory mitigating circumstances).

No conflict exists between the Ruffin decision and Florida Supreme Court opinions. The Florida Supreme Court has likewise held that the Chapman harmless error standard applies to Hitchcock claims. Compare White v. Dugger, 523 So. 2d 140 (Fla.) (instructional error harmless where proffered nonstatutory mitigating factors "would conclusively have had no effect" upon the advisory verdict), cert. denied, ___U.S.___, 109 S. Ct. 184 (1988) with Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988) (instructional error

7 In the Eleventh Circuit a copy of the suggestion for a rehearing en banc is distributed to each panel judge and every active judge of the court. Eleventh Circuit Operating Procedures, Rule C.4.b.(1).

not harmless where significant nonstatutory mitigating evidence introduced).

The State contends that the Court of Appeals in deciding Ruffin "rejected" Hitchcock. To the contrary, the Eleventh Circuit followed Hitchcock, which explicitly discusses the threshold showing necessary to trigger harmless error review:

> Respondent [Dugger] has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing, our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

Hitchcock v. Dugger, 107 S. Ct. at 1824.

The State's argument rests on the faulty assumption that the Eleventh Circuit never considered harmless error in the Ruffin decision. Judge Tjoflat, in his dissent, suggests remanding the case to the district court to consider harmless error in light of the parties' failure to brief the issue. But surely Judge Clark and Judge Hatchett read the dissent and would have ordered this option if they thought it worthy. Moreover, every panel member in Ruffin and every active judge in the Eleventh Circuit reviewed the State's harmless error argument as set forth in its motion for a rehearing en banc. The Court rejected the State's argument, and not one judge requested that the Court be polled on a rehearing. (App. at 3a).

C. The Decision Granting Petitioner A Resentencing Hearing Should Be Upheld In Light Of The Harmfulness Of The Hitchcock Error

The jury instruction in Ruffin was improper and clearly not harmless. The jury at respondent's capital sentencing hearing was not permitted to consider proffered evidence of significant and relevant nonstatutory mitigating circumstances in violation of the

rules set forth in Lockett and Hitchcock. This evidence included information on respondent's deprived childhood, low intelligence and poor judgment. This evidence, if accepted by the jury along with the other evidence, would undoubtedly have been relevant to whether Ruffin was deserving of the death penalty. Thus under the standard set forth in Chapman, there is clearly a reasonable possibility that the error complained of "might have contributed" to the sentencing determination. See Chapman v. California, 386 U.S. 18, 23 (1967). Nor can it go unnoticed that the State does not currently contend that the Hitchcock error was harmless or purport to show that it was harmless. Instead, the State only asserts that the Eleventh Circuit Court of Appeals failed to consider harmless error, because the court never explicitly mentioned harmless error.

## II. OTHER REASONS INDEPENDENTLY WARRANT THE RELIEF GRANTED BY THE ELEVENTH CIRCUIT

In any event, the decision below to vacate Ruffin's death penalty and remand for a new sentencing hearing is warranted by the recent decision of this Court in Johnson v. Mississippi, ___ U.S. ___, 108 S. Ct. 1981 (1988) (plurality). As in Johnson v. Mississippi, the State in Ruffin relied on an aggravating circumstance, a prior conviction, that subsequent to the sentencing hearing was vacated. Both judge and jury premised Ruffin's sentence on misinformation of constitutional magnitude concerning the killing of Deputy Coburn. The prosecutor stressed in his closing argument that Ruffin stood convicted for the premeditated murder of Deputy Coburn. However, the Coburn first degree murder conviction was later ruled unconstitutional and reduced to second degree murder because the evidence did not support a finding of intentional murder. Hall v. State, 403 So.

2d 1319, 1320-21 (Fla. 1981). Had the sentencer known that there was no basis for the premeditated murder conviction, and considering Ruffin's background and character, the balancing process would have likely weighed in favor of a life sentence. The district court's holding that any prior conviction would have been given the same weight deprived Ruffin of his right to have the jury, as well as the judge, sentence him on the basis of accurate information concerning his background and character. Accordingly, the sentence was based on "misinformation of a constitutional magnitude" and cannot stand. See also Zant v. Stephens, 462 U.S. 862, 885, 887 n.23 (1983); United States v. Tucker, 404 U.S. 443, 447-49 (1972).

A new sentencing procedure is furthermore required here because Ruffin received ineffective assistance of counsel at the sentencing phase of his trial, under Strickland v. Washington, 466 U.S. 668 (1984). The only evidence defense counsel introduced in mitigation was a psychiatric report made by a state-appointed psychiatrist to show that Ruffin was capable of standing trial. (R1-12A-R191-2). Although that report contained substantial evidence of Ruffin's deprived childhood, his low intelligence and his poor judgment, it presented a far from complete picture of Ruffin.

In the district court, Ruffin offered, without contradiction, affidavits from his family, friends, employer, ministers and from a psychologist, which showed that trial counsel had neither investigated nor analyzed available mitigating evidence. (R4-43). The affiants who knew Ruffin stated that he was well regarded in the community, showed a great concern for others, was kind, generous and loving, was naive and slow to learn but was an industrious worker, was religious and active in his church and, because of his

sorry childhood, craved approval and was a follower.[8] They would have testified that Hall, on the other hand, was a dominating and threatening person -- physically, verbally and mentally[9] -- and that Ruffin was dominated by Hall, a man significantly older and larger than Ruffin.

The psychologist's report presented to the district court showed that (a) Ruffin only had the mental ability of a person between twelve and thirteen years old, (b) he never had a close friendship with a man nor any role model before his involvement with Hall, (c) he felt sorry for Hall because Hall had no friends and Ruffin could identify with that deprivation, (d) Ruffin's motivation for accompanying Hall on the day of the killing was his desire for approval and friendship, (e) as the events of the Hurst scenario unfolded Ruffin acted out of fear of Hall, (f) Ruffin is a shy, "mild mannered," non-aggressive and "naive" young man who would need protection in a prison environment, (g) he "did not evidence a criminal type personality" and "[h]is social and moral values . . . [are] the same type as those of most of our society" (Report by Elizabeth A. McMahon annexed to the McMahon affidavit submitted in R4-43).

The District Court rejected Ruffin's ineffective assistance claim without a hearing on the ground that, assuming trial counsel was inefffective in failing to present this type of evidence, Ruffin could not "establish the prejudice component of the Strickland test because the evidence would have only barely

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8 Ruffin's own counsel told the jury that Ruffin was not virtuous or a church-goer (TR 1401). Had he bothered to gather evidence from the community he would have found otherwise.

9 Hall's size, violent nature and prior criminal record caused people in the community to fear him. See, e.g., affidavits of Donnie Bell Swint ¶¶ 13-14, L.C. Lyons ¶¶ 8-9, Richard Grant ¶¶ 2, 7, 8, 11 (R4-43).

[affected] the sentencing profile [which had been] presented to the judge and jury" by trial counsel (R4-46-18, 19). A comparison of the affidavits proffered to the district court with the report of the state-appointed psychiatrist clearly shows that the district court's conclusion was wrong.[10]

Finally, a new sentencing proceeding is required because (i) the State relied on the "heinous, atrocious and cruel" aggravating circumstance, which is unconstitutionally vague, especially where, as here, Ruffin did not intend or commit the killing, see Maynard v. Cartwright, ___U.S.___, 108 S. Ct. 1853 (1988); (ii) the State relied on the robbery and kidnapping aggravating circumstance although Ruffin had no notice thereof and the jury was not charged on the elements of robbery or kidnapping; (iii) the State improperly relied on Ruffin's conviction for the Coburn killing, which occurred after the crime at issue in this case, both to establish the aggravating circumstance of a prior criminal conviction, and to deprive Ruffin of the mitigating circumstance of "no significant history of prior criminal activity" (emphasis added); (iv) the trial court's instructions improperly imposed the burden on Ruffin of proving that mitigating circumstances outweighed aggravating circumstances; and (v) the trial court failed to weigh the mitigating circumstances of domination by Hall, and minor participation by Ruffin, which were established here.

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10 See Ruffin v. State, 420 So.2d at 595 (dissent) (". . . Ruffin is entitled to a new sentencing proceeding because of ineffective assistance of counsel in that phase of the trial. His counsel presented no live evidence in the sentencing proceeding despite a strong suspicion that Ruffin was under the domination of Freddie Hall and that his personal history has traits similar to those the United States Supreme Court felt appropriate in Eddings v. Oklahoma . . . . There is no reason evident why any responsible counsel would not have done this.")

These many additional errors confirm that the Hitchcock error here was harmful, and indicate that this case is not an appropriate one for Supreme Court review; rather, the Eleventh Circuit's decision, to remand for a new sentencing proceeding, should be left undisturbed.

## CONCLUSION

Based upon the foregoing, respondent requests this Court to deny the State's petition for writ of certiorari.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

| | | |
|---|---|---|
| MACK RUFFIN, JR., | ) | |
| | ) | |
| Petitioner-Appellant, | ) | |
| Cross-Appellee, | ) | |
| | ) | |
| v. | ) | CASE NO. 86-3485 |
| | ) | |
| LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida, | ) | |
| | ) | |
| Respondents-Appellees, | ) | |
| Cross-Appellants. | ) | |

RESPONDENT'S MOTION IN OPPOSITION
TO PETITIONER'S MOTION FOR LEAVE
TO FILE SUPPLEMENTAL BRIEF

NOW COMES the custodian, by and through the undersigned Assistant Attorney General, who files this Response in Opposition to supplemental briefing and as grounds therefor would aver:

I.

On May 4, 1987, Judge Hatchett entered an order denying Petitioner's request for supplemental briefing. That Order now serves as law of the case.

II.

Counsel for the custodian would pause to point out that Petitioner has submitted a most competent and inclusive nine page motion which serves as the functional equivalent of a supplemental brief. The Hitchcock claim is one that this Court has not ignored, and, at this juncture, there is little that supplemental briefing on this case would accomplish in light of the internal Eleventh circuit decisions now being filed.

WHEREFORE, counsel for the custodian prays that this Honorable Court make and enter an Order denying further supplemental briefing.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
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ELEVENTH CIRCUIT
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CLERK

NO. 86-3485

HACK RUFFIN, JR.,

Petitioner-Appellant-
Cross-Appellee,

versus

RICHARD L. DUGGER, Secretary, Florida Department of Offender Rehabilitation, and TOM BARTON, Superintendent, Florida State Prison at Starke, Florida,

Respondents-Appellees-
Cross-Appellants.

Appeals from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion June 22, 1988, 11 Cir., 198__, ____F.2d____).

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the Judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

ORD-41